UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (DAYTON)

AMERICAN POWER, LLC	:	Case No. 3:17-cv-00347-WHR
Plaintiff,	:	(Judge Walter H. Rice)
v.	:	
DOUGLAS O. HARRIS, et al.	:	
Defendants.	:	

MARMON AND FONTAINE DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM (DOC. NO. 63)

Defendants' objections to the Magistrate's Report and Recommendations were fully briefed more than a year ago, on September 20, 2018. (Doc. No. 54) The "new decision" that Plaintiff refers to in its belated "Supplemental Opposition to Defendants' Objections to Report and Recommendation of Magistrate Judge" ("Supplemental Opposition," Doc. No. 63), was issued just one week later, on September 27, 2018. *Dougherty v. Esperion Therapeutics, Inc.*, 905 F.3d 971 (6th Cir. 2018). Plaintiff did not bring this decision to the Court's attention when the decision was issued, nor did Plaintiff bring the decision to the Court's attention in February 2019 when Plaintiff filed its motion for clarification (Doc. No. 59). Plaintiff's attempt to interject "new" case law more than a year after briefing closed and more than a year after the "new decision" was issued, should be disregarded.

Plaintiff's failure to bring *Dougherty* to the Court's attention earlier is understandable, because the decision is completely inapposite to the Marmon and Fontaine Defendants' dismissal arguments. The press release at issue in *Dougherty* was

disseminated by the issuer of the securities contemporaneously with the issuance of stock; the press release specifically addressed investors and contemplated that investors might rely on the information contained therein. *See*, *e.g.*, *Dougherty*, 905 F.3d at 976-77, 981 (stating that "Esperion's press release also included cautionary language, warning investors" that the statements being made were "pursuant to the safe harbor provisions of the federal securities laws" and referencing "Esperion's statements to its investors"). Moreover, the Sixth Circuit did not find that there had been securities fraud, only that plaintiffs had pled enough regarding the *scienter* of the ***issuer of the securities*** to survive a motion to dismiss. (*Id.* at 982.)

Here, in complete contrast, the Marmon and Fontaine Defendants[1] did not issue any securities, let alone make any representations in connection with the issuance of securities. Nor does Plaintiff plead ***any facts*** to support the requisite *scienter* as to the Marmon and Fontaine Defendants (as compared to Dektrix, the actual issuer of the securities). Rather, Plaintiff's claims against the Marmon and Fontaine Defendants are premised on (1) a press release from 2014 (over ***two years*** before Plaintiff invested in Dektrix) that was not directed to Plaintiff, not provided to Plaintiff by the Marmon or Fontaine Defendants, and not put out in connection with the issuance of any securities, let alone the ones at issue here (Doc. No. 1, Complaint ("Comp."), ¶ 37); (2) a pair of August 2016 communications that Plaintiff does not allege contained any misrepresentations (Comp., ¶¶ 30-31); and (3) a press release and promotional video from 2014 and 2016, respectively, that Plaintiff does not allege that it relied on, or even viewed.

[1] Marmon Highway Technologies, Inc. ("Marmon") and Kelly Dier (together, the "Marmon Defendants"), and Fontaine Engineered Products, Inc. ("Fontaine"), Henry Prochazka, and Berkley Buchanan (together, the "Fontaine Defendants").

(Comp., ¶ 44)

Plaintiff's claims fail for the many reasons set forth in the Marmon and Fontaine Defendants' motion to dismiss, reply in support, and objections to the Magistrate's ruling and recommendation (Doc. Nos. 16, 33, 46). The *Dougherty* decision cited in Plaintiff's Supplemental Opposition does nothing to change that. Plaintiff's claims against the Marmon and Fontaine Defendants should be dismissed.

Respectfully submitted,

s/ Timothy G. Pepper
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